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No. 88-1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. LIPTON, INC., and KRAFT, INC.,

Petitioners,

vs.

R.C. BIGELOW, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Dated: August 3, 1989

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QUESTIONS PRESENTED

1. Should the petition for certiorari be granted when:

- Petitioners claim they have abandoned the challenged transaction and have repeatedly represented to the courts below that the case is moot;

- The case has been remanded to the district court where discovery is being conducted on the issue of mootness; and

- The decision of the court of appeals is interlocutory, in effect denying petitioners' motion for summary judgment?

2. When two firms control 84% of a three-firm market and the third firm seeks to enjoin the acquisition of one firm by the other pursuant to section 16 of the Clayton Act: is the plaintiff firm, in opposing a motion for summary judgment returnable two weeks after commencement of the action, entitled to an inference that it is threatened with injury of the sort the antitrust laws are intended to prevent or must it prove actual injury to establish the existence of a genuine issue of material fact respecting its standing?

3. If the plaintiff firm was not entitled to such an inference, was summary judgment precluded when plaintiff adduced substantial, credible evidence that the acquiring firm was paying a price premium for market power, that the acquiring firm had in the past engaged in predation against competitors and that the acquiring firm intended to eliminate plaintiff from the market by denying it access to retail shelf space, coopting its distributors and denying it access to scarce raw materials?

LIST OF PARTIES

Thomas J. Lipton, Inc. ("Lipton")
Kraft, Inc. ("Kraft")
R.C. Bigelow, Inc. ("Bigelow")

Bigelow is a privately-owned corporation with no parent companies, subsidiaries or affiliates.

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BRIEF IN OPPOSITION

Respondent respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 867 F.2d 102 (1989), and is reproduced in petitioners' appendix, pp. la-l9a. The opinion of the United States District Court for the District of Connecticut is reported at 689 F. Supp. 76 (1988), and is reproduced in petitioners' appendix, pp. 20a-3la.

JURISDICTION

The courts below had jurisdiction of the subject matter, and the petition was timely filed in this Court. The subject matter of the petition, however, may be moot.

COUNTERSTATEMENT OF THE CASE

Introduction

Preliminarily, the Court should be aware that the petitioners themselves have asserted to the courts below that this matter is moot. Proceedings in the district court are underway, over their strenuous objection, to determine whether their representations were true that no live case or controversy exists within the meaning Article III of the United States Constitution. Also, this cause comes to the Court in the form of an interlocutory appeal from, in effect, a denial of petitioners' motion below for summary judgment.

Certiorari should also be denied because the court of appeals properly applied the decisions of this Court pertaining to the standing of a competitor to challenge anticompetitive conduct violative of Section 2 of the Sherman Act and Section 7 of the Clayton Act, and it properly found that significant issues of fact preclude summary judgment.

Statement of Facts

The facts as described in the opinion of the court of appeals, reported at 867 F.2d 102, 103-04 (3a, 4a),[1] are sufficient and need not be repeated.

However, Kraft and Lipton assert as a basic policy consideration in support of their petition for certiorari that competitors should be denied "standing" to object to acquisitions such as that before the Court on the supposition that competitors are trading their nuisance value for damages or they fear that the acquisition will sharpen competition because efficiencies will result in better products at lower prices to the consumer.

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[1] Citations to the opinions below refer to, and are hereinafter identified by, the page numbers in petitioners' appendix. All other appendix citations refer to respondent's Appendix and are referenced as (App.).

This supposition is diametrically opposite to the factual situation at hand. Bigelow does not seek damages. It seeks an injunction that will preserve competition in the market. Bigelow is in fact the most efficient producer and Lipton is apparently the least efficient producer and is seeking to buy its largest competitor for the purpose of achieving a monopoly which will "cover" the inefficiencies of its own operations. The impact of the attempted monopoly is not that there will be intensified competition with Bigelow but that competition will be eliminated by the pressures placed on supermarkets to eliminate the Bigelow product from supermarket shelves and the pressures placed upon the few sources of supply of crucial herbs to jeopardize Bigelow's access to those supplies.

As a matter of simple fact, the interest and the position of Bigelow are identical to those of the consumer in maintaining a competitive market in the herbal tea business.

Proceedings Below

By its complaint Bigelow sought to enjoin consummation of the acquisition of Celestial by Lipton, and the resulting control of 84% of the U.S. herbal tea market, as violative of Section 2 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. §§ 2 and 18.

Upon serving and filing the complaint, in which Lipton, Unilever, Kraft and Celestial were named as defendants, Bigelow moved for a temporary restraining order ("TRO") enjoining the acquisition. Prior to the service of answers, the district court held a hearing on May 31, 1988, on Bigelow's motion. At that hearing, counsel for defendants served a memorandum in opposition to Bigelow's motion which the district court deemed to be a motion to dismiss for lack of standing, pursuant to Fed. R. Civ. P. 12(b). The district court signed a TRO and directed expedited discovery solely on the standing issue. A hearing on defendants' motion was scheduled for June 10, 1988, and a hearing on Bigelow's motion for a preliminary injunction was scheduled for June 20, 1988.

On June 15, 1988, five days before the evidentiary hearing was scheduled to begin, the district court handed down a decision granting defendants' motion, which it treated as one for summary judgment. Specifically, the district court held that plaintiff had failed "at this preliminary stage to raise a genuine issue of material fact with respect to whether it is threatened with antitrust injury" and consequently it lacked standing to maintain this action. (31a) Bigelow immediately filed a notice of appeal and moved before the district court for a stay pending appeal to the United States Court of Appeals for the Second Circuit.

The district court denied the motion but stayed the acquisition until the Second Circuit could rule on a stay, provided such motion was filed within 24 hours. The next day Bigelow moved for a stay before the court of appeals. The court of appeals, in possession of the record of proceedings in the district court and briefs by the parties, heard argument on the stay motion on June 21, 1988. With petitioners asserting the requirement that the moving party must establish a strong likelihood of success on appeal, Judges Newman, Kearse and Cardamone unanimously granted from the bench an injunction prohibiting consummation of the acquisition pending Bigelow's appeal.

The court of appeals (Judges Altimari, Lumbard and Dearie) heard oral argument of the appeal on July 21, 1988. Then, on September 14, 1988, prior to the issuance by the court of appeals of an opinion on the merits, counsel for Kraft moved for dismissal of the appeal on the grounds that "the transaction at issue . . . has been abandoned by Kraft" and that "the appeal is moot." (App. A) Kraft further stated that it had sold Celestial to "another group not presently in the tea or herb[al] tea business." (App. A) The motion papers indicated that on September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar Capital Partners, Inc. ("Vestar"), a firm specializing in leveraged buyouts, for a purported management-led buyout of Celestial. Lipton's counsel represented that it "ha[d] no objection to the dismissal of the appeal for mootness."

By order dated October 3, 1988, the court of appeals granted Kraft's motion to dismiss for mootness "on condition that the

parties agree to reasonable conditions by October 13, 1988." (App. B-3) Further, the court ordered "[i]n the event an agreement is not reached, the parties are directed to submit a proposed order, on notice, containing such reasonable conditions on or before October 21, 1988." (App. B-3) Bigelow asserted that the order of the district court denying it standing to protect itself should be vacated and that there should be an undertaking not to pursue the transaction in the future. The parties were unable to agree to reasonable conditions and on November 1, 1988, the motion to dismiss the appeal as moot was denied, with the notation: "Opinion to follow."

Two days later, Kraft and Lipton moved the court to reconsider denial of their motion and for a second time asked the court to dismiss the appeal as moot. Defendants stated that the purported management-led buyout of Celestial had in fact closed on November 1, 1988, that "now there can be *no* doubt" that the appeal is moot (App. C-2 emphasis in the original) and that "the public interest does not require an advisory opinion from this Court on any of the issues briefed and argued." (App. C-4-5) The renewed motion for dismissal of the appeal based on mootness was denied on November 22, 1988.

The petition submitted by Lipton and Kraft completely omits any reference to their repeated and emphatic representations to the court of appeals that the case is moot. Such a deliberate and material omission speaks for itself.[2]

On January 17, 1989, a unanimous court of appeals reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.

The court found it had not been established by the facts available to it that the appeal was moot, adding that defendants had failed to satisfy their "heavy" burden of demonstrating that

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[2] On May 15, 1989, May 15, 1989 and May 16, 1989, respectively, prior to filing the petition for certiorari, Unilever, Lipton and Kraft filed answers in the district court each of which raises the affirmative defense that the action is moot. (App. D)

there is no "reasonable expectation" this same controversy will recur. It is this decision reversing the grant of summary judgment which petitioners now seek leave to appeal.

Defendants then moved for rehearing, with a suggestion for rehearing en banc. This was denied on March 8, 1989. No judge of the court of appeals voted in favor of rehearing.

The mandate from the court of appeals finally issued on March 21, 1989. Then, on March 23, 1989, counsel for Lipton wrote to the district court requesting that "this litigation be held in abeyance" pending a decision by this Court on a petition for certiorari. Bigelow opposed that request as nothing more than a means of sidetracking an examination of the issue of mootness in the district court while seeking relief in this Court on the assumption that there is a case or controversy.

At a status conference on May 5, 1989, the district court rejected defendants' demand that, on grounds of "the economy of judicial administration," the case be held in abeyance pending action by this Court on defendants' yet-to-be-filed petition for certiorari. It set a schedule which included the filing of answers by the defendants and discovery on the limited issue of mootness, with such discovery to be completed by September 1, 1989. Defendants have served answers to the complaint, asserting therein that the issues are "moot"; responded to interrogatories; produced documents; and been deposed for the purpose of completing a factual record upon which the district court can determine whether this action is moot.

REASONS FOR DENYING THE WRIT

POINT I

THIS ACTION IS NOT APPROPRIATELY BEFORE THE COURT.

This action is now in the preliminary stage of pleadings, discovery and motions in the district court. There has yet to be an evidentiary hearing. The petition is based on the reversal of

an order of summary judgment respecting Bigelow's standing, placing it in an essentially interlocutory posture.

Moreover, there is a more serious question respecting petitioners' own "standing" to seek review by this Court. The exercise of judicial power by a federal court requires the existence of a case or controversy within the meaning of Article III of the Constitution. Federal courts have no power to issue advisory opinions or "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Rather, each federal court's judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The Court has established that "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *see also DeFunis v. Odegaard*, 416 U.S. 312 (1974).

The order of the court of appeals remanded the case to the district court for further proceedings. The Second Circuit held that, notwithstanding defendants' claims that the transaction at issue had been abandoned and that the case was moot, it retained jurisdiction to decide the appeal under the "capable of repetition, yet evading review" doctrine, citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). (7a)

The opinion makes clear that although the defendants had failed to present sufficient facts to satisfy their "heavy" burden and avoid an adverse appellate decision on the merits, significant questions of fact remained regarding the purported "mooting" event, *i.e.*, the claimed abandonment by Kraft of the sale of Celestial to Lipton and alleged sale to Vestar. Discovery proceedings are underway in the district court for the purpose of completing the factual record as to outstanding mootness issues and to permit the district court to make an informed, final determination whether this case is now moot.

Petitioners have turned the matter of mootness on and off as a mere device to achieve an immediate tactical advantage. After oral argument, they did not want the Second Circuit to rule on the antitrust issues and so they sought dismissal based on mootness. Now, having lost in the court of appeals, they seek to forestall a determination in the district court on their own claims of mootness while they seek another chance to prevail on the antitrust issues in this Court.

Petitioners not only ignore their own claims of mootness, but fail to disclose completely in their petition the pertinent facts which they repeatedly affirmed had rendered this case moot.[3] Moreover, they make no mention whatsoever of the fact that discovery on the mootness issue is now being conducted in the district court, where the litigation is now proceeding in accordance with the mandate of the court of appeals. Such deliberate omissions violate this Court's instruction that counsel have a " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' " of the case. *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985), quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). Further, such omissions may violate Rule 34.1(g) of this Court (petitioner's statement of the case shall contain all that is material to the consideration of the questions presented).

This Court should deny the petition and permit the litigation to proceed in the district court. Should the district court determine that the case is not moot, it will then conduct proceedings on the merits of respondents' claims. In that event, petitioners would not be deprived of an opportunity to petition this Court for review after entry of a final judgment.[4]

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[3] Petitioners make a passing reference to the mootness issue in the final pages of their argument, but fail in their "Statement of the Case" or discussion of the "Proceedings Below" to identify the present status of the case in the district court or to discuss any of the facts supporting their claims as to mootness.

[4] *See, e.g., Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967) ("However, because the Court of Appeals remanded the case, it is not yet ripe for review by this court. The petition for a writ of certiorari is denied.")

Should the district court decide that the case is moot, it will enter an appropriate order of dismissal. Petitioners' suggestion that this Court should undertake to decide the mootness issue on an incomplete record and then vacate the opinion of the court of appeals, thereby reinstating the opinion of the district court (Petition at 17), is absurd.

POINT II

THE SECOND CIRCUIT'S OPINION IS A PROPER APPLICATION OF THE LAW CONSISTENT WITH *CARGILL* AND OTHER DECISIONS OF THIS COURT.

The distinctive feature of this case is that the threat to Bigelow comes from a deliberate acquisition of overwhelming monopoly power and the consequent exposure of Bigelow to being cut off from its customers at the retail level and from its suppliers of crucial ingredients. Bigelow, in a fight for its commercial life, seeks an injunction to assure a competitive market - which is also in the public interest - not damages.

The court of appeals viewed the issue before it as a narrow one, limited by the procedural posture of the case: "does a competitor [Bigelow] have standing under the Clayton Act to enjoin the proposed merger of the two largest producers in the relevant market whose post-acquisition market share is more than sufficient to establish a *prima facie* showing of monopoly power and a presumption of illegality?" (10a) The court found that at this early stage, the stark, uncontested facts as to market structure were sufficient to give rise to a rebuttable presumption of antitrust injury to Bigelow.[5] The use of such a presumption is entirely consistent with *Cargill, Inc. v. Monfort of Colo.*,

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[5] The court did *not* adopt the conclusion of the district court that Bigelow had not submitted sufficient evidence of the threat of antitrust injury. (Petition at 12) Rather, because of the presumption adopted, it did not reach the substantial evidence of predation in the record (Point III, *infra*).

Inc., 479 U.S. 104 (1986), and with this Court's decisions from *Brown Shoe Co. v. United States*, 320 U.S. 294 (1962) to the present.

Cargill, which came to this Court after the equivalent of a full trial and final judgment, requires proof of antitrust injury. The Second Circuit did not dispense with that requirement, but found it applicable "to the granting of permanent injunctive relief *after a plenary trial on the merits.*" (15a) (emphasis added) It rejected petitioners' argument that *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 108 S. Ct. 1996 (1988), correctly read *Cargill* as requiring proof of antitrust injury at the preliminary injunction stage. Since neither the majority nor Justice Stevens' dissent in *Cargill* addressed the quantum of proof required on a motion for summary judgment returnable two weeks after commencement of an action, the decision below is clearly consistent with *Cargill*.[6] It is consistent

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[6] To the extent the Second and Fifth Circuits may disagree as to the plaintiff's burden of proof on a preliminary motion, it is largely a function of the differing standards they applied. In *Phototron*, the court held that on a preliminary injunction motion plaintiff must show "a substantial likelihood that plaintiff will prevail on the merits," including the issue of antitrust injury. It further found that because the district court had determined that the pleadings were sufficient, a remand was required. 842 F.2d at 98. Rather than remand, however, the court then undertook the task of weighing the evidence of record and found it insufficient.

Here, the Second Circuit found it necessary to determine only "whether plaintiff has raised a genuine issue of material fact sufficient to show a threat of antitrust injury." (11a) Rather than undertaking to evaluate the entire factual record, a task not commonly assumed by appellate courts, it found that Bigelow was entitled to "all reasonable inferences that follow from" the unambiguous and uncontested market share data (18a), and remanded for a full preliminary injunction hearing and trial, neither of which had occurred.

The difference in approach taken by the two courts is hardly a "major difference in the regulation of mergers" (Petition at 16) that requires immediate resolution by this Court. If the case survives mootness analysis in the district court, there will be opportunity for review after entry of final judgment.

with the antitrust policy articulated by this Court because it refuses to foreclose access to the federal courts in cases involving mergers of most dubious legality by adopting a standard of proof that is unrealistic or impossible to meet.

In addition, unlike *Cargill*, this is not primarily a predatory pricing case.[7] To the contrary, Bigelow's principal claims concern the threat of the sort of devastating anticompetitive acts for which post-injury relief would be ineffectual: forcing Bigelow off the shelves of supermarkets, cutting off its raw material supplies and stealing its distributors (who can carry only a limited number of lines and could not handle both Lipton-Celestial and Bigelow).

Bigelow's concerns arise in the context of an attempted acquisition by Lipton that would give it 84% of the national herbal tea market, which was conceded to be the relevant product and geographic market. (5a) Unlike *Cargill*, where the second and third largest competitors combined for a joint market share of only 20.4% (which was well below the market share of the remaining industry leader whose share was 27.3%), petitioners here are Bigelow's *only* other nationwide competitors. *Cargill* indicated that a limited market share of only 20% was insufficient to successfully conduct the predatory pricing alleged.[8] Accordingly, the Court held that the only showing of injury to plaintiff was a potential loss of profits as a result of increased

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[7] Although Bigelow alleged in its complaint, *inter alia*, the risk of below-cost predatory pricing, Bigelow consistently took the position throughout the proceedings below that this was the least of its several concerns. There was unchallenged evidence of predatory pricing by Lipton in the record: Mr. Bigelow testified as to prior predatory price cutting by Lipton and statements at the time by a Lipton officer to the effect that Lipton had assembled a "war chest" and "whatever it took to sell below cost, whatever, they [Lipton] weren't going to get beaten."

[8] Although no allegation of below-cost pricing was made before the district court in *Cargill*, this Court predicted that a predatory pricing claim would probably fail because of lack of market share. 479 U.S. at 119-20, n. 15.

competition, which did not constitute "antitrust injury."[9] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1983) (plaintiff did not have standing to complain that its profits were reduced by defendant's acquisition of a bankrupt company that would otherwise have gone out of business, because the injury resulted from increased competition).

Those facts are far different from those presented here: Lipton, which had a declining 32% market share, had failed in all attempts at legitimate competition and finally resorted to an attempt to purchase monopoly power outright by offering a preemptive price for the 52% market share of its only major competitor. Bigelow seeks an injunction, not damages, to preserve a competitive market. Its interest and the public interest are manifestly identical.

The Second Circuit held that Lipton's deliberate attempt to acquire overwhelming monopoly power gave rise to a rebuttable presumption that such power would be exploited, *i.e.*, that it would be used in a predatory manner against the only remaining competitor of significance - Bigelow.[10] The Second Circuit also noted that, "Within a week following Lipton's announcement that it planned to acquire Celestial, Lipton allegedly approached Bigelow, expressing an interest in negotiating the purchase of plaintiff [Bigelow], the only remaining competitor in the herbal tea market with a significant market share." (4a) The Second Circuit found that in opposing a motion for summary judgment Bigelow was entitled to the benefit of all reasonable inferences from such actions, including a presumption that following the merger Lipton would be likely to eliminate competition by, *inter alia*, reducing Bigelow's access to supermarket shelf space for its products. (18a) That inference is not only

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[9] In *Cargill*, the plaintiff conceded that there would be increased competition and lost profits, but that it would not be driven from the market. Bigelow makes no such concession.

[10] Although counsel for Lipton would not concede, at oral argument before the Second Circuit, that 84% was sufficient to create monopoly power (prompting Judge Lumbard to inquire whether 99% control was necessary), the district court and the court of appeals specifically found that 84% constituted a *prima facie* showing of monopoly power. (12a, 24a)

consistent with *Cargill*, but is mandated by Section 2 of the Sherman Act and Sections 7 and 16 of the Clayton Act, which prohibit deliberate acquisition of monopoly power.[11]

In effectuating the policies of the antitrust laws, this Court has consistently recognized the utility of presumptions arising from the acquisition of competitors.

In *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963), the Court, in order to "simplify the test of illegality" under Section 7 of the Clayton Act, held that a presumption that an acquisition is unlawful may arise from market share and concentration data without "elaborate proof of market structure, market behavior or probable anticompetitive effects." That presumption has been consistently applied. In *United States v. Aluminum Co. of America*, 377 U.S. 271, 279-80 (1964), the Court, relying on *Philadelphia National Bank*, invalidated a merger that would have increased Alcoa's market share by only 1.3%. *See also, United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-51 (1966); *United States v. Citizens and Southern Nat'l Bank*, 422 U.S. 86, 120-21 (1975).

Another firmly established presumption is that "no monopolist monopolizes unconscious of what he is doing" and that "improper exclusion (exclusion [of competitors] not based on efficiency) is always deliberately intended." *Aspen Skiing Co. v.*

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[11] The district court's determination that mere possession of market power does not *ipso facto* condemn a market participant absent predatory intent ignored the manner of acquisition of that power. (24a) Although citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 262, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) for this proposition, the district court missed the essential continuation of the cited passage:

> But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition. *This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant.* And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market (emphasis added).

Aspen Highlands Skiing Co., 472 U.S. 585, 602-03 (1985), quoting Judge Hand in *Alcoa*, 148 F.2d at 432 and R. Bork, *The Antitrust Paradox*, 160 (1978).

Such presumptions are not necessarily conclusive; their effect is to shift to the defendant the burden of showing at trial "affirmative justifications" for the proposed merger. *Philadelphia National Bank*, 374 U.S. at 370-71. The shifting of the burden of going forward was what the Court referred to in *United States v. General Dynamics Corporation*, 415 U.S. 486, 498 (1974), in finding that the defendant had carried the burden of rebutting the *prima facie* case made by the government. This is in accordance with the standard for standing issues generally, which recognizes that proof of injury is not required to invoke, initially, the jurisdiction of a court. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Here, the challenged acquisition if completed will create monopoly power in violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. Here, an actual reduction of competition among former competitors is patent and admitted. Here, injury to the only remaining competitor is both a real threat and a logical presumption.

The court of appeals left open the possibility that at a plenary trial Lipton might be able to establish a relevant market in which its share would not be presumptively unlawful or that it would be unable to engage in successful predation because of low barriers to entry. (17a-18a) Those defenses, which can only be adjudicated after a full trial on the merits, are inextricably intertwined with the issue of threatened injury to Bigelow. Unless the evidence is viewed as a whole, merger cases will dissolve into a rush to judgment in which those mergers that have the least economic justification will escape scrutiny because of the plaintiff's inability to marshall all of its proof within a few days after commencement of an action.

The loss of such scrutiny would deal a major blow to antitrust enforcement. As Professor Bork has stated, the law should strike at horizontal mergers "creating very large market shares that

leave fewer than three significant rivals in any market," R. Bork, *The Antitrust Paradox*, 221, 406 (1978), exactly the situation presented here. The reasons are as follows:

> The correct interpretation of Clayton 7 begins with the answer to a basic question: Why should the law apply more severe standards to corporate size achieved by merger than to the same size achieved by growth? A number of possible answers have been given, but only one is consistent with both the statute and the goal of consumer welfare: size by internal growth demonstrates superior efficiency, but merger that creates real market control will certainly have the effect of restricting output and may or may not create new efficiencies. Thus, it is intelligible, though not inevitable, social policy to apply a stricter standard to mergers.

Id. at 199.

POINT III

BIGELOW PRESENTED SUFFICIENT EVIDENCE OF FACTUAL ISSUES TO PRECLUDE SUMMARY JUDGMENT.

Bigelow's evidence was presented in the context of a motion to dismiss the complaint which, after seven days of discovery directed solely to the issue of standing, was deemed converted to a motion for summary judgment. The district court made its determination even before a full preliminary injunction hearing. Petitioners argue, however, that Bigelow's proof of prior episodes showing Lipton/Unilever's predatory practices and their payment of a premium price for effective monopoly power were insufficient to establish threatened injury and that, prior to its consummation, Bigelow was required to submit conclusive proof of actual injury that would result from the challenged acquisition. (Petition at 16)

Petitioners' argument is contrary to the holding of *Cargill* which determined the standard to be *the threat* of antitrust

injury. Indeed, *Cargill* specifically distinguished between damage claims under Section 4, which requires a plaintiff to show "actual" injury, and Section 16, which only requires the showing of "threatened" loss or damage.

Because it found a sufficient threat of injury to Bigelow to flow from the uncontested facts as to market structure, the court of appeals was not required to analyze the additional evidence submitted by Bigelow. Bigelow did, however, submit substantial evidence of predatory intent — a surprising amount given the seven days Bigelow was allotted by the district court to review over 350,000 pages of documents defendants had submitted to the Federal Trade Commission in the course of a six month Hart-Scott-Rodino investigation. Bigelow's evidence was either ignored by the district court or was deemed to be merely evidence of "hard ball" competition. However, as this Court has often recognized, what may be permissable "vigorous" competition in a competitive market becomes predation when directed by an intentional monopolist at its only competitor. *See, e.g., United States v. Colgate & Co.*, 250 U.S 300, 307 (1919).

Bigelow's evidence included unrebutted testimony that within one week of Lipton's announcement of its intended acquisition of Celestial, Lipton approached Bigelow to see if it were for sale.[12] That fact was noted by the district court: "In plaintiff's view, this evidence demonstrates that Lipton was acting with predatory intent when it sought to acquire Celestial." (26a) Inexplicably, the district court never again discussed the probative value of this unrebutted evidence.[13] That omission was not lost upon the court of appeals. (4a)

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[12] The combined market shares of Lipton/Celestial/Bigelow would have been approximately 97%.

[13] The district court tacitly acknowledged that monopoly power *arguably* would be sufficient to prove standing under Section 16 if defendants were acting with predatory intent. (24a)

Bigelow also submitted evidence supporting its claim that Lipton was paying a substantial monopoly premium for Celestial.[14]

Bigelow submitted additional credible evidence that there were world-wide shortages of critical herbs and that Lipton had previously attempted to corner various other markets of limited supply (including decaffeinated tea and tea bagging machinery). Evidence of Lipton's prior efforts to control shelf space and distribution and of Bigelow's inability to counter the combined promotional and advertising budget of Lipton/Celestial was submitted to the district court.

At the hearing before the Second Circuit on the stay pending appeal, the court expressed incredulity at petitioners' argument that Lipton's documents were merely indicative of "vigorous" competition.[15] Those documents included statements that "eliminating competition is the course we should pursue"; directions to employees regarding "keeping competitors out of the tea section [in supermarkets]"; intentions to reduce "Bigelow tea visibility" in all accounts; statements that Lipton would not restrict itself to normal competition ("natural death") in getting rid of competitors and that it intended to push Bigelow off the shelves of supermarkets; and assertions that Lipton would bring pressure to bear on distributors not to carry Bigelow products and use its position to gain preferences in the allocations of scarce herbs. An independent consultant retained by Lipton was publicly quoted as stating that after the acquisition of Celestial, "Lipton is going to hammer Bigelow in retail groceries."

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[14] This evidence included, *inter alia*, Kraft's own investment banker's evaluation which was approximately half the Lipton price; a price earnings analysis which placed Lipton's price at more than 87 times projected net earnings, and more than 150 times actual earnings (conservatively estimated, considering Celestial had net losses in 1984 and 1985, respectively, and had no earnings in 1986). Moreover, the district court's comparison of the purchase price paid by Kraft four years before with that which Lipton was prepared to pay (25a) completely ignored the evidence submitted by Bigelow that Celestial had consistently lost or failed to make money for Kraft.

[15] The tape of the June 21, 1988 hearing before the court of appeals is available at the Courthouse. No written transcript of the hearing was made.

The Court in *Cargill* declined the invitation of the United States to enunciate a *per se* rule denying competitors standing to challenge acquisitions (on the basis of predatory pricing theories). 479 U.S. at 121. Petitioners here attempt to revisit the issue. They seek, in effect, a *per se* rule that will deny every competitor standing to seek injuctive relief by requiring proof of actual, not threatened, injury resulting from predation by the merged entity. Because such proof cannot come into being until after the challenged merger is consummated, the burden is one which can never be met. Adoption of petitioners' standard would make Section 16 of the Clayton Act a dead letter and effectively terminate private enforcement of Section 7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL WINDELS, JR.*
ANTHONY A. DEAN
CLAYTON A. PRUGH
STEPHEN C. GREEN
WINDELS, MARX, DAVIES & IVES
156 West 56th Street
New York, New York 10019

COLIN E. GUNN
35 Church Lane
Westport, Connecticut 06880

Attorneys for Respondent
R.C. Bigelow, Inc.

* Counsel of Record

APPENDIX

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,
Appellant,

v.

Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,
Appellees.

88-7505

NOTICE OF MOTION
state type of motion
for
Dismissal for Mootness

Use short title

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq.

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
156 West 56th Street
New York, New York 10019
(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The transaction at issue – the acquisition by Lipton of Celestial Seasonings from Kraft – has been abandoned by Kraft. Kraft has sold Celestial Seasonings to another group not presently in the tea or herb tea business. Accordingly, the appeal is moot and should be dismissed.

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ Plaintiff ☐ Defendant

Date 9/14/88

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is
granted denied

Previous requests for similar relief and disposition.

None.

Statement of the issue(s) presented by this motion:

Whether this appeal is now moot in that the transaction being challenged by Bigelow has been abandoned by the parties with the Celestial Seasonings business being sold by Kraft to another party not presently engaged in the tea or herb tea business.

Brief statement of the facts (*with page references to the moving papers*): The December 5, 1987 purchase contract between Kraft and Lipton permitted either party to cancel the contract at various points. The parties had extended the date until June 1, 1988. On May 26, 1988, Appellee-plaintiff Bigelow filed its complaint to enjoin the transaction in the United States District Court for the District of Connecticut. Kraft and Lipton agreed on May 31, 1988 to postpone closing until the District Court completed its hearing. On June 15, 1988 the District Court entered summary judgment in favor of defendants-appellees. Plaintiff-appellee moved for a stay, which the District Court denied on June 16, 1988. Plaintiff-appellee moved for a stay pending appeal before this Court. The Court granted a stay on June 21, 1988, and ordered expedited briefing and appeal. The case was set for argument and was argued on July 21, 1988. On August 26, 1988 the parties again extended the termination date of the contract until September 2, 1988. On September 11, 1988, Kraft notified Lipton that Kraft was canceling the December 5, 1987 contract. On September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.) for a management-led buy-out of Celestial Seasonings.

Summary of the argument (*with page references to the moving papers*):

The only relief sought in the complaint below was an injunction against the acquisition of Celestial Seasonings by Lipton. That transaction will not be taking place. No live issue remains for resolution by this Court, the appeal should be dismissed. *See, e.g., Trane Co.* v. *O'Connor Securities*, 718 F.2d 26 (2d Cir. 1983) (dismissing appeal from the denial of a preliminary injunction as moot where the challenged potential transaction at issue there was abandoned).

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,

Appellant, 88-7505

v.

Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,

Appellees.

NOTICE OF MOTION
state type of motion
for
Dismissal for Mootness

Use short title

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq,

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
156 West 56th Street
New York, New York 10019
(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The transaction at issue – the acquisition by Lipton of Celestial Seasonings from Kraft – has been abandoned by Kraft. Kraft has sold Celestial Seasonings to another group not presently in the tea or herb tea business. Accordingly, the appeal is moot and should be dismissed.

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ Plaintiff ☐ Defendant

Date 9/14/88

ORDER

Before: Hon. J. Edward Lumbard, Hon. Frank X. Altimari, Circuit Judges and Hon. Raymond J. Dearie, District Judge.

IT IS HEREBY ORDERED that this motion is granted on condition that the parties agree to reasonable conditions by October 13, 1988. In the event an agreement is not reached, the parties are directed to submit a proposed order, on notice, containing such reasonable conditions on or before October 21, 1988.

Elaine B. Goldsmith, Clerk

/s/

By: Edward J. Guardino, Deputy Clerk

October 03, 1988

United States Court of Appeals
FOR THE SECOND CIRCUIT

R.C. Bigelow, Inc.,
Appellant,
v.
Unilever N.V., Thomas J. Lipton, Inc., Celestial Seasonings, Inc., and Kraft, Inc.,
Appellees.

Use short title

88-7505

NOTICE OF MOTION
state type of motion
for
Petition to Reconsider Dismissal for Mootness (Confidential – Filed Under Seal Pursuant to Court Order)

MOTION BY: (*Name, address and tel. no. of law firm and of attorney in charge of case*)

Kirkland & Ellis
200 E. Randolph
Chicago, Illinois 60601
(312) 861-2000
Tefft W. Smith, Esq,

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

(Lipton has no objection. Bigelow objects.)

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice? ☒ Yes ☐ No

C. If Yes, enter date: Argued on July 21, 1988

OPPOSING COUNSEL: *(Name, address and tel. no of law firm and attorney in charge of case)*

Windels, Marx, Davies & Ives
156 West 56th Stree:
New York, New York 10019
(212) 237-1000
Paul Windels, Jr., Esq.

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
United States District Court for the District of Connecticut, Judge Jose A. Cabranes

Brief statement of the relief requested:

The management-led buyout of Celestial to Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.), a group not presently in the herb tea business, closed on November 1, 1988. Now there can be *no* doubt that the transaction at issue in this case — the sale of Celestial to Lipton — will not occur. Thus, Appellees ask the Court to dismiss this case as moot and enter appellees October 21, 1988 proposed order of dismissal. (Ex. A)

By: *(Signature of attorney)*

/s/ Tefft W. Smith
Tefft W. Smith

Appellant or Petitioner:
☐ **Plaintiff** ☐ **Defendant**

Appearing for: *(Name of Party)*

Appellee or Respondent
☐ **Plaintiff** ☒ **Defendant**

Date 11/3/88

ORDER

IT IS HEREBE ORDERED that the moton be and it hereby is
granted denied

Previous requests for similar relief and disposition. On September 14, 1988, appellees submitted a motion to dismiss the appeal for mootness and supporting affidavits. On October 3, 1988, the Court granted appellees' motion to dismiss on the condition the parties agree to "reasonable conditions." The parties were unable to do so. Pursuant to the Court's October 3, 1988 order, on October 21, 1988 the parties submitted proposed orders of dismissal. On November 1, 1988, the Court notified appellees that their September 14, 1988 motion to dismiss for mootness was denied because there was a danger the transaction could occur, presumably because the Kraft and Vestar transaction had not yet been consummated.

Statement of the issue(s) presented by this motion: Whether this appeal is now moot in that there is no possibility the transaction being challenged by appellant can occur because Celestial has been sold to another party, not presently in the tea or herb tea business.

Brief statement of the facts (with page references to the moving papers): On December 5, 1987 Kraft entered a contract to sell Celestial to Lipton. The contract permitted either party to cancel the contract at various points. The original closing date was scheduled for May 1, 1988 — well before the critical cold-weather selling season. Kraft and Lipton agreed to postpone the closing while the FTC completed its review of the transaction. On May 26, 1988, Bigelow filed its complaint to enjoin the transaction. The FTC cleared the transaction, as announced in the Wall Street Journal on June 15, 1988 — the same day the district court entered summary judgment in appellees' favor. On June 16, 1988, the district court denied appellant a stay. On June 21, 1988, this Court granted appellants' motion for a status quo stay and ordered an expedited appeal. The case was argued on July 21, 1988. On August 26, 1988, Lipton and Kraft agreed to extend the contract termination date to September 2, 1988, almost

twelve weeks after the stay. On September 11, 1988, although not legally bound to do so, Kraft terminated its agreement with Lipton because a) Celestial's peak marketing and manufacturing season had arrived and the business was suffering adverse effects from being in operational "limbo"; and b) because it had an opportunity to enter an agreement, led by Celestial's management, to buy-out Celestial on more favorable terms. Appellees's September 14, 1988 motion to dismiss this appeal for mootness and supporting affidavit to this Court accurately represented: Celestial "was being sold" and that "on September 12, 1988, Kraft entered into an agreement with an investment unit of Vestar . . . for a management-led buyout of Celestial." (Appellees' 9/14/88 motion, p. 2; T. Smith's 9/14/88 Aff. ¶ 2, p. 2.) As sworn to by R. Wertheimer, counsel for appellee, Lipton has no connection with C.S. Herb Holdings, Inc. or Vestar Capital Partners Inc. or any of their principals or affiliates. (Wertheimer 9/26/88 Aff. ¶ 3.) Lipton or Unilever never planned to, or in fact actually ever did, invest in or participate in any other way in the management-led buy-out of Celestial. (Wertheimer 9/26/88 Aff. ¶ 4; Spear 11/3/88 Aff. ¶ 5.) As attested to in the attached Spear affidavit, the Kraft/Vestar transaction closed on November 1, 1988. Thus, there is no possibility the transaction which Bigelow complained of — Kraft's sale of Celestial to Lipton — can occur.

Summary of the argument (with page references to the moving papers): The only relief sought in the complaint below was an injunction against Kraft's sale of Celestial to Lipton. The sale of Celestial to an investment unit of Vestar Capital Partners, Inc. (C.S. Herb Holdings, Inc.) as part of a management-led buyout, was closed on November 1, 1988. (*See* attached Spear affidavit.) Thus, no live issue remains for resolution by this Court, and the appeal should be dismissed. *See e.g., Trane Co. v. O'Connor Securities*, 718 F.2d 26 (2d Cir. 1983) (dismissing appeal from the denial of a preliminary injunction as moot where the challenged transaction at issue was abandoned). Furthermore, the "matter of reimbursement of Bigelow's attorneys' fees," if any, is properly presented to the district court, not the court of Appeals, in any event. Finally, the public interest does not require an advisory opinion from this Court on any of the

issues briefed and argued. (*See also* Appellees' September 14, 1988 Motion to Dismiss for Mootness and supporting affidavit; Appellees' September 26, 1988 Reply Memorandum and supporting affidavits; and Appellees' October 21, 1988 Memorandum in Support of its Proposed Order to Dismiss for Mootness.)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

Civil Action No.

B-88-299 (GAC)

ANSWER OF DEFENDANT UNILEVER N.V.

Defendant Unilever, N.V. ("Unilever") hereby answers the Complaint of Plaintiff R.C. Bigelow, Inc. ("Bigelow").

* * *

FOURTH DEFENSE

The claims set forth in the Complaint are moot.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

Civil Action No.

B-88-299 (GAC)

ANSWER OF DEFENDANT THOMAS J. LIPTON, INC.

Defendant Thomas J. Lipton, Inc. ("Lipton") hereby answers the Complaint of Plaintiff R.C. Bigelow, Inc. ("Bigelow").

* * *

THIRD DEFENSE

The claims set forth in the Complaint are moot.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

R.C. BIGELOW, INC.,

Plaintiff,

v.s.

UNILEVER N.V., THOMAS J. LIPTON, INC., CELESTIAL SEASONINGS, INC. and KRAFT, INC.,

Defendants.

CIV. ACTION NO.

B-88-299 (JAC)

ANSWER OF KRAFT, INC.

Defendant Kraft, Inc. ("Kraft") answers the Complaint of R.C. Bigelow, Inc. as follows:

* * *

Second Defense

There is no controversy between plaintiff and defendants.

Third Defense

This action is moot.